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In The

Supreme Court of the United States

October Term, 2004

SAN REMO HOTEL L.P., THOMAS FIELD, ROBERT FIELD, AND T&R INVESTMENT CORP.,

Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, DEPARTMENT OF CITY PLANNING, CITY PLANNING COMMISSION, BOARD OF PERMIT APPEALS, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF THE PETITIONERS

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BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF THE PETITIONERS

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this brief as *amicus curiae* in support of the petitioners, and letters of consent are filed with the Clerk of the Court.[1]

THE NAHB'S INTEREST ARISES FROM ITS MEMBERS' CONCERNS AS TO THEIR ABILITY TO BRING AN ACTION IN FEDERAL COURT CLAIMING A TAKING UNDER THE FIFTH AND FOURTEENTH AMENDMENTS

The NAHB represents over 220,000 builder and associate members throughout the United States. Its members include people and firms that construct and supply single family homes as well as apartment, condominium, commercial and industrial builders, land developers and remodelers. It is the voice of the American shelter industry. It is, therefore, concerned with a procedure which effectively strips the federal courts of any role in the judicial review process when a takings claim is asserted.

The NAHB has appeared before the Court as an *amicus curiae* or as "of counsel" in a number of cases involving the rights and remedies of landowners who have been adversely affected by governmental actions. These include: *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First*

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1 No counsel for any of the parties authored any part of this brief. No person or entity other than the NAHB has made any monetary contribution to the preparation or submission of this brief.

English Evangelical Lutheran Church of Glendale v. County of L.A., 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987)[2]; *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Commun. for a Great Or.*, 515 U.S. 697 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'Ship v. United States Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 124 S.Ct. 1537 (2004); *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004), *cert. granted*, 125 S.Ct. 27 (2004); and *Lingle v. Chevron U.S.A., Inc.*, 363 F.3d 846, *cert. granted*, 125 S.Ct. 314 (2004).

SUMMARY OF THE ARGUMENT

Collateral estoppel (issue preclusion) should not apply when a landowner is required to assert a takings claim in state court in order to ripen its federal claim because it effectively denies a federal forum to a plaintiff asserting a federal claim for relief. It is not mandated by anything in *Williamson County* nor does it represent good policy.

Indeed, good policy calls for eliminating the state litigation prong of *Williamson County* all together. Landowners should be allowed to assert their federal constitutional claims in federal court in the first instance.

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2 The Court's opinion cited the NAHB's brief. (483 U.S. at 840.)

ARGUMENT

I.

COLLATERAL ESTOPPEL (ISSUE PRECLUSION) SHOULD NOT BAR FEDERAL COURT ADJUDICATION OF A FIFTH AND FOURTEENTH AMENDMENT TAKINGS CLAIM

This Court has, with a few exceptions not applicable to the case at bar, characterized the jurisdiction of regulatory takings as requiring

> "... 'essentially ad hoc, factual inquiries,' *Penn Central*, 438 U.S., at 124, designed to allow 'careful examination and weighing of all the relevant circumstances.' *Palazzolo*, 553 U.S., at 636 (O'CONNOR, J., concurring)." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002).

A takings claim alleges that governmental action requires the payment of just compensation under the mandate of the Fifth and Fourteenth Amendments. Those claims frequently turn on the facts peculiar to the case.

> "How the facts are found will often dictate the decision of the federal claims. 'It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues.' *Townsend v. Sain*, 372 U.S. 293, 312." *England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411, 416-417 (1964).

To the same effect, *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 542 n. 5 (1986) ("We have frequently recognized the importance of the facts and the fact finding process in constitutional adjudication.").

If the Ninth Circuit's decision is allowed to stand, it will effectively strip the federal courts of any role in the elaboration of takings jurisprudence because of the overlap between state court interpretations of state constitutional protections against uncompensated takings on the one hand, and similar federal law on the other. *DLX, Inc. v. Commonwealth of Kentucky*, 381 F.3d 511, 521 (6th Cir. 2004). Indeed, that was the situation in the case at bar. *San Remo Hotel L.P. v. San Francisco City and County*, 364 F.3d 1088, 1094 (2004). However, there are significant differences between the manner in which facts are found in federal and state courts.

More particularly, an action brought under 42 U.S.C. § 1983 – the mechanism used by the plaintiffs here (364 F.3d at 1093) – requires that factual issues regarding the government's *liability* for a taking must be determined by a jury:

> "[W]e hold that the issue whether a landowner has been deprived of all economically viable use of his property is a predominantly fact question. As our implied acknowledgement of the procedure in *Williamson County, supra*, suggests, in actions at law otherwise within the purview of the Seventh Amendment, this question is for the jury." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 720-721 (1999).

On the other hand, a landowner who brings an inverse condemnation action in the State of California has a right to a jury trial "but that right is limited to the question of damages." *Hensler v. City of Glendale*, 876 P.2d 1043, 1052 (Cal. 1994), *cert. denied*, 513 U.S. 1184 (1995). More specifically,

> "In both eminent domain and inverse condemnation proceedings, the issue of just compensation is to be tried to the jury. All other questions of fact, or of mixed fact and law, are to be tried ... without reference to a jury. Consistent with this rule, the court, rather than the jury, typically decides questions concerning the *preconditions to recovery* of a particular compensation, even if the determination turns on contested issues of fact." *Mount San Jacinto Cmty. Coll. Dist. v. Superior Court*, 11 Cal.Rptr.3d 465, 469 (Cal. App. 2004) [internal quotation marks and citations omitted; italics in the original].

See also, *Cumberland Farms, Inc. v. Town of Groton*, 808 A.2d 1107, 1123-24 (Conn. 2002) (landowner had no right to a jury trial on issues of liability in inverse condemnation case). Thus, while *Del Monte Dunes* held that takings claimants have a Seventh Amendment right to a jury trial in the federal courts, the states do not extend a similar right.

Moreover, the resemblance between the state procedure element mandated by *Williamson County*, and abstention, is obvious. Both would defer (or even outright relinquish) federal court jurisdiction in favor of state court adjudication:

> "Ripeness becomes closely mingled with abstention doctrines when deference rests on the prospect of some future state court proceeding rather than an ongoing litigation." 13A Wright, Miller & Cooper, *Federal Practice and Procedure*, § 3532.1, *Ripeness, Sources of Doctrine*, 123 (2d ed. 1984).

The Second Circuit relied on the resemblance between ripeness and abstention in *Santini v. Conn. Hazardous Waste Mgmt. Serv.*, 342 F.3d 118, 128-129 (2d Cir. 2003), *cert. denied*, 125 S.Ct.104 (2004). *Santini* held that a landowner who was, after all, involuntarily in state court litigating a takings claim, could preserve his right to have a federal court adjudicate his federal takings claim by filing a reservation – similar to that called for in *England*. *Santini* was based on the evident unfairness of first forcing

a landowner into state court in order to ripen his federal claim, and then holding that the act of ripening the federal claim also barred it. (342 F.3d at 130.)

The plaintiffs in the case at bar made use of a *Santini* reservation because they "specifically reserved their federal claims for adjudication in federal court, pursuant to *England* ..." (*San Remo*, 364 F.3d at 1093.) However, the Ninth Circuit just as specifically rejected the use of that procedure. (*id.* at 1095.)

In light of the procedure set forth by this Court in *Williamson County*, the position taken by the Second Circuit states the better policy. *Santini* requires the takings claimant to first seek compensation in state court but, having done so, then allows a full and free adjudication of that claim – including factual determinations – under federal law in a federal court.

Finally, there is simply no jurisdictional bar to the reservation procedure used by the plaintiffs here and endorsed by the Second Circuit. Neither res judicata (claim preclusion) nor collateral estoppel (issue preclusion) is jurisdictional; each of them is an affirmative defense which may be waived. *Kenmen Eng'g v. City of Union*, 314 F.3d 468, 479 (10th Cir. 2002) (res judicata); and *Rekhi v. Wildwood Indus., Inc.*, 61 F.3d 1313, 1317 (7th Cir 1995) (collateral estoppel). Moreover, whether or not the preclusion doctrines may be triggered in any case is a matter of judicial discretion.[3] In fact, all of the Circuits which have considered the question, including the Ninth Circuit in the case at bar (364 F.3d at 1094), have held that an appropriate reservation "will suffice to defeat claim preclusion in a subsequent federal action." *DLX, Inc., supra*, 381 F.3d at 523 n. 9.

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3 See, e.g., *Balbirer v. Austin*, 790 F.2d 1524, 1526 (11th Cir. 1986) ("We note at the outset that application of collateral estoppel in a particular case is a matter of trial court discretion ... but that this court [on appeal] exercises plenary review over the rules governing collateral estoppel").

"[C]onsiderations of fairness and justice" must support any takings analysis. *Tahoe-Sierra*, 535 U.S. at 333. See also, *Armstrong v. United* States, 364 U.S. 40, 49 (1960)(the Fifth Amendment bars "forcing some people alone to bear the public burden which, in all fairness, should be borne by the public as a whole.") It is neither fair nor just to tell a property owner, "Go to state court before you come to federal court," and then after she pursues that procedure, say "Sorry. You can't get into federal court because the state court already decided your case." The Ninth Circuit's decision should be reversed.

II.

THE PROCEDURE SET FORTH IN *WILLIAMSON COUNTY*, WHICH REQUIRES A TAKINGS CLAIMANT TO FIRST SEEK JUST COMPENSATION IN STATE COURT IN ORDER TO RIPEN A FEDERAL ACTION, SHOULD BE ELIMINATED

The requirement that a landowner first assert a takings claim in state court rests on *prudential* ripeness principles. Thus, *Williamson County* does not present a jurisdictional bar to a federal court determination of whether a taking has occurred and, if so, what just compensation should be awarded. In *Suitum*, this Court stated:

> "The only issue presented is whether Suitum's claim of regulatory taking of her land in violation of the Fifth and Fourteenth Amendments is ready for judicial review under *prudential ripeness principles*. There are *two independent prudential hurdles* to a regulatory takings claim brought against a state entity in federal court. *Williamson County* ... explained that a plaintiff must demonstrate that she has both received a 'final decision regarding the application of the [challenged] regulations to the property at issue' from 'the government entity charged with implementing

> the regulations,' *id.* at 186, and sought 'compensation through the procedures the State has provided for doing so,' *id.*, at 194." *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733-734 (1997) emphasis supplied; [footnote omitted].

Similarly, in *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1012-1013 (1992), this Court held that the landowner had "properly alleged Article III injury in fact" and proceeded to a determination on the merits. It did so even though a permit procedure had been implemented while state court litigation was ongoing, because this Court did not think it fair to apply the prudential requirement of finality set forth in *Williamson County*.

A. Landowners Bear a Staggering Burden by Being Forced to Litigate Their Takings Cases in State Court First.

The cost to the landowner of having to detour through state court litigation should give this Court pause. The plaintiffs in the case at bar initially filed their § 1983 action in federal court in May 1993. (*San Remo*, 364 F.3d at 1093.) They will have a decision on *jurisdiction* by mid-2005. Twelve years, and still counting, with no decision by a federal court *on the merits* in sight.

Unfortunately, the resemblance to abstention is also apparent in terms of the time necessary to obtain federal resolution. Forty years ago, Justice Douglas voiced his unhappiness with the delay resulting from abstention, noting that eight and ten year periods between initiation and resolution of a lawsuit were not unheard of. *England, supra*, 375 U.S. at 425-429 (Douglas, J., concurring). As a result, although not raised by the parties, he argued that it was time for this Court, *sua sponte*, to reevaluate the abstention doctrine. (*id.* at 423.)

Professor Daniel R. Mandelker, one of the leading academics of the land use bar and typically an advocate on behalf of local government on land use issues, in his

testimony to Congress, referred to a survey of federal district court cases involving takings claims between 1990 and 1997 and found that 81% of them were decided on procedural grounds and never reached the merits. Testimony of Daniel R. Mandelker Before the Judiciary Committee, U.S. House of Representatives, reproduced at 31 Urb. Law. 234, 236-237 (1999) ("Mandelker Testimony").

That same survey also determined that litigation which did result in an opinion on the merits by a Court of Appeals took, on the average, 9.6 years. John J. Delaney & Duane J. Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse*, 31 Urb. Law. 195, 205 (1999).

B. *Williamson County*'s State Court Element has been Resoundingly Criticized by Congress, the Courts, Academics, and Even Planners.

Put simply, *Williamson County*'s state court procedure is a disaster. Commentators have derided the problems spawned by *Williamson County* as "worse than mere chaos,"[4] "absurd,"[5] "nonsense,"[6] "riddled with

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4 Robert H. Freilich, *The Public Interest is Vindicated: City of Monterey v. Del Monte Dunes*, 31 Urb. Law 371, 387 (1999).

5 Gregory Overstreet, *Update on the Continuing and Dramatic Effect of the Ripeness Doctrine on Federal Land Use Litigation*, 20 Zoning & Plan. L. Rep. 17, 27 (1997).

6 Peter A. Buchsbaum, *Should Land Use be Different? Reflections on Williamson County*, in *Taking Sides on Takings Issues: Public and Private Perspectives* 480 (A.B.A. 2002; Thomas E. Roberts, ed.).

obfuscation and inconsistency,"[7] a "Kafkaesque maze,"[8] and "a fraud or hoax on landowners,"[9] just to name a few.

On two occasions, the House of Representatives passed bills (by substantial margins) that would have dispensed with *Williamson County*'s state court procedure element.[10] In reaching that conclusion, the House Judiciary Committee received testimony from Professor Mandelker who declared that his review of lower federal court decisions showed a "wholesale abdication of federal jurisdiction in law suits where issues are raised concerning the constitutional validity of land use regulation," because "federal judges have distorted the Supreme Court's ripeness precedents to achieve [the] undeserved and unwarranted result [of] avoiding the vast majority of takings claims on their merits." Mandelker Testimony, 31 Urb. Law. at 236-237. His conclusion, and testimony, was that the "state court first" requirement should be eliminated.

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7 Mandelker Testimony, 31 Urb. Law. at 236.

8 Timothy J. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. West. L. Rev. 1, 51 (1992).

9 Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37, 71 (1995).

10 See H.R. 1534, 105th Cong., Private Property Rights Implementation Act of 1997 (passed House on Oct. 22, 1997, by vote of 248-178) (§2(e)(3): "[A] final decision shall not require the party seeking redress to exhaust judicial remedies provided by any State ...."); H.R. 2372, 106th Cong., Private Property Rights Implementation Act of 2000 (passed House on Mar. 16, 2000, by vote of 226-182) (§2(e)(4): "[A] case is ripe for adjudication even if the party seeking redress does not exhaust judicial remedies provided by any State ...."). Both bills are available at the Library of Congress's "Thomas" website, http://thomas.loc.gov/ (last visited Jan. 20, 2005).

Even the American Planning Association ("APA"),[11] which submitted an *amicus curiae* brief on behalf of the Tahoe Regional Planning Agency in *Suitum* (No. 96-243), believed that the ripeness requirement set forth in *Williamson County* was wrong; the heading to its fifth argument in that brief states:

> "THE COURT SHOULD ELIMINATE THE SECOND PRONG OF THE RIPENESS DOCTRINE REQUIRING THE LAND-OWNER TO HAVE SOUGHT AND BEEN DENIED JUST COMPENSATION THROUGH AVAILABLE STATE PRO-CEDURES AND ALLOW LANDOWNERS WITH REGULATORY TAKINGS CLAIMS TO PURSUE THEIR FEDERAL REMEDY IN FEDERAL COURT." APA *Suitum Amicus* Br. at 23.

The brief goes on to explain why the APA took the position it did:

> "*Amicus curiae* submits that the rule the takings plaintiffs must first sue in state court for compensation under the federal constitution is incorrect. When this Court first adopted the ripeness rules, there was no remedy for compensation in federal courts. Indeed, this Court adopted ripeness rules to avoid deciding whether a federal compensation remedy is available. In the absence of a federal compensation remedy, it perhaps made sense

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11 The APA has described itself as "the oldest and largest organization devoted to advancing state and local land use planning," and its constituents are "those charged with addressing the public's interest in how land is used and with drafting regulations to ensure that the impacts of adverse land use are minimized." APA *Amicus* Br., *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, (No. 00-1167) at 1.

to require takings plaintiffs to seek a state compensation remedy first.

> "This situation has now changed. In 1987, in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U. S. 302 (1987), this Court held that a remedy for compensation in takings cases is available under the federal constitution. Federal courts should not require takings plaintiffs to go to court to seek compensation before taking advantage of this federal remedy." APA *Suitum Amicus* Br. at 25-26.

Aside from the serious policy implications that arise from the state court procedures element, commentators have noted that *Williamson County*'s second element is difficult, if not impossible, to reconcile with the holding in *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156 (1997).[12] The upshot of *College of Surgeons* is that a municipal defendant, sued by a landowner for a taking and other constitutional violations, may remove that case to federal court. (522 U.S. at 164-66). Yet the pertinent federal statute allows removal from state court *only* if the plaintiff could have filed the case in federal court in the first instance. See 28 U.S.C. § 1441(a). How can that be? How can it be that a takings plaintiff must file his case in state court first (as *Williamson County* purportedly requires), but then a municipal defendant has the option to game the system and control jurisdiction by removing to federal court (under *College of Surgeons*)? Yet, that plaintiff apparently could not have filed in federal court initially, so the removal

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12 The *Williamson County/College of Surgeons* conundrum is fully explained in Michael M. Berger and Gideon Kanner, *Shell Game! You Can't Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-parody Stage*, 36 Urb. Law. 671, 676-682 (2004).

statute should presumably not apply (but *College of Surgeons* holds removal is appropriate in these circumstances). It hurts just to think through this problem.

Reams of articles will be written on this dilemma, and everyone involved—municipalities, property owners, and the federal judiciary—will spend years scratching their heads on whether, and how, *Williamson County* and *College of Surgeons* can be reconciled. The Eighth Circuit described the situation as an "anomalous ... gap in Supreme Court jurisprudence." *Kottschade v. City of Rochester*, 319 F.3d 1038, 1041 (8th Cir.), *cert. denied*, 124 S.Ct. 178 (2003).

In the end, landowners who want to assert a takings claim deserve to know whether, and under what circumstances, they can access a federal forum for their constitutional grievances. Respectfully, the only way to have those questions completely and fairly answered is for this Court to now re-consider *Williamson County's* state court detour procedure and tackle it head-on.[13]

C. Nothing in the Constitution *Requires* that State Court Litigation Precede Federal Adjudication on the Merits of a Takings Claim.

It must be noted that just compensation can only be awarded after a taking has been found. That does not represent a problem when a governmental entity has taken

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13 As a practical matter, the only realistic opportunity the Court will have to directly address the state court procedures element from *Williamson County* is in a case postured such as the one at bar. In the current jurisprudential climate, it would border on malpractice for an attorney to direct his client to file a takings claim in federal court initially. This is especially so in light of the *Kottschade* case, where the property owner filed initially in federal court but the Eighth Circuit required him to repair to state court. As the Eighth Circuit concluded, resolution of the *Williamson County/College of Surgeons* conundrum "is for the Supreme Court to say, not us." (319 F.3d at 1038.)

possession of land, whether by a physical invasion or by formal condemnation proceedings, because there is no question that a taking has occurred. The only issue left in such a situation is to decide the amount of just compensation to which the landowner is entitled. However, things are not so simple when a landowner alleges that a *regulatory* taking has occurred. In that case, the first issue is whether a taking has occurred at all. This Court's discussion in *Williamson County* on the state compensation procedure ripeness issue focused entirely on the recovery of just compensation; it says not a word about whether a regulatory taking had actually occurred. (473 U.S. at 194-196.)

However, the resulting detour through the state courts means that the issue of whether a regulatory taking has occurred must be litigated by the landowner in the state court proceeding.[14] As it now stands, based on this Court's statement in *Williamson County* that the Fifth Amendment proscribes only taking without just compensation (473 U.S. at 194), there is no federal jurisdiction to determine whether

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14 And yet another puzzle arises. A state inverse condemnation lawsuit begins by determining whether the government is liable for a taking in the first place. In that suit, the state trial court must review the validity and assess the propriety of the municipality's underlying conduct. Yet, in *Williamson County*, this Court held that "[e]xhaustion of review procedures is not required" of § 1983 takings claimants; they do not have to exhaust "administrative and judicial procedures by which an injured party may seek review of an adverse decision ...." (473 U.S. at 194 n. 13; 193). But *that* is an integral part of a state inverse condemnation action – the taking claimant seeks review of an adverse land use decision. Indeed, applying the polestar test from *Penn Central* and conducting an "ad hoc" inquiry into the facts necessarily entails review of the underlying government action. How could the factors from *Penn Central* – the character of the government's action, the economic impact of the regulation, and the property owner's investment-backed expectations (see 438 U.S. at 124) – be considered by a state court *unless* it reviewed the underlying land use decision?

a taking has occurred in an as-applied context where facts are of paramount importance. At the same time, a facial attack – which presents only a question of law – claiming a taking can be brought directly in a federal court. *Yee v. City of Escondido*, 503 U.S. 519, 533-534 (1992).[15]

Of course, the NAHB recognizes that, for takings purposes, the Constitution is infringed only when just compensation is not paid after a taking has occurred. But, nothing in the Constitution requires that a state court must issue some kind of certification that one of its municipalities owes a landowner for a taking. "You can read the Fifth Amendment forward, backward, upside-down or sideways, and you will not find that requirement anywhere." Berger and Kanner, *Shell Game!, supra*, 36 Urb. Law. at 696. A federal court is as well-equipped as a state court to interpret the Fifth Amendment, determine that a municipality has committed a taking, and order the payment of just compensation to avoid a constitutional infraction.[16]

Finally, doomsday cries that federal court review will unduly interfere with local prerogatives ring hollow. E.g., Glenn P. Sugameli, *"Takings" Bills Threaten People, Property, Zoning and the Environment*, 31 Urb. Law. 177 (1999). Federal courts decide matter of local concern all of the time in a variety of parochial contexts. Consider, as one

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15 The Court has remarked on the "uphill battle" facing a takings plaintiff who brings a facial challenge. *Tahoe-Sierra*, 535 U.S. at 321, quoting from *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987).

16 "[A] case containing claims that local administrative action violates federal law ... is within the jurisdiction of federal district courts." *College of Surgeons*, 522 U.S. at 163. There is nothing groundbreaking about that point. Section 1983 states that those acting "under color of state law" must pay when they commit actions that infringe the federal constitution – and that includes municipalities. See *Owen v. City of Independence*, 445 U.S. 622, 636-637 (1980); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

example, the standards for determining whether speech is obscene and therefore loses First Amendment protections. From the Nixon Administration up through the current Bush Administration, it has been well-established that whether an artistic or literary work is obscene is determined by "contemporary community standards" and definitions under the "applicable state law." *Miller v. California*, 413 U.S. 15, 24 (1973). See also *Ashcroft v. ACLU*, 535 U.S. 564 (2002), *aff'd and remanded by* 124 S.Ct. 2783 (2004) (whether on-line materials are harmful to minors will depend in part on "local community standards"). There has never been a requirement that a state court must first determine what those "local community standards" are, as a ripening prerequisite to federal court adjudication of a First Amendment claim.

This would be a much simpler judicial world if this Court were to review its holding in *Williamson County* and make clear that a landowner could, if it wished, go directly to federal court to have a determination made whether, first, a taking had occurred and then, second, what just compensation should be awarded.

III.

CONCLUSION

According to the dean of historians of the American Revolution, an independent judiciary is embedded as an essential part of the constitutional scheme to preserve property rights:

> "Placing legal boundaries around issues such as property rights ... had the effect of isolating these issues from popular tampering, partisan debate, and the clashes of interest-group politics. Some things, including the power to define property and interpret constitutions, became matters not of political interest to be determined by legislatures but of the 'fixed principles' of law to be determined by judges." Gordon S. Wood, *The Radicalism*

> *of the American Revolution* 324-25 (First Vintage Books ed. 1993).

Slamming the doors of the federal courthouse shut on land owners – to the extent that virtually none of the lower federal courts interpret the Just Compensation Clause or adjudicate the merits of takings claim – cannot be countenanced under the Founders' vision.

Accordingly, the NAHB contends that both good policy and this Court's prior opinions require that neither res judicata nor collateral estoppel apply when a landowner is forced to begin litigation in state court in order to ripen a federal takings claim. The *Santini* reservation used by the Second Circuit would at least allow a federal court to adjudicate the federal takings claim.

The NAHB further contends that it is time for this Court to reconsider – and to abandon – the requirement that a landowner first seek compensation through state litigation procedures before its federal takings claim is ripe for adjudication in federal court.

In short, the requirement of initial state court litigation should have no preclusive effect whatsoever on subsequent takings litigation in federal court or, better yet, the requirement should be entirely eliminated.

Dated: January 24, 2005

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AMICUS CURIAE

BRIEF

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In the Supreme Court of the United States

SAN REMO HOTEL, L.P., ET AL.

Petitioners

v.

CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, ET AL.

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICI CURIAE FOR ELIZABETH J. NEUMONT (AND ALL OTHERS SIMILARLY SITUATED) IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the "state procedures" aspect of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194-97 (1985), which mandates that property owners exhaust state judicial remedies before pursuing federal claims for just compensation in federal court, should be overruled.

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INTEREST OF AMICI CURIAE

Amici curiae are a certified class of property owners in Monroe County, Florida, who are currently litigating a federal takings claim in the Court of Appeals for the Eleventh Circuit. *See Neumont v. State of Florida*, No. 04-13610-EE (appeal docketed July 22, 2004). Like petitioners (and thousands of other property owners across the nation), amici are facing "ripeness" arguments by a governmental defendant who seeks to avoid federal adjudication of a federal constitutional claim. In particular, despite class members having filed at least two actions in state court concerning the regulatory action for which they now seek just compensation, amici have been denied their day in federal court because they have assertedly failed to satisfy the "state procedures" requirement of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194-97 (1985). *See Neumont v. Monroe County, Florida*, 242 F. Supp. 2d 1265, 1274 (S.D. Fla. 2002) (dismissing amici's federal claims for just compensation "because plaintiffs have failed to exhaust their state remedies").

Accordingly, for themselves and their fellow property owners around the country, amici file this brief to explain that *Williamson County*'s state procedures requirement was wrong in its inception and is wrong today. As such, it ought to be scrapped in its entirety.

Amici's counsel represented the petitioner in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), and he has filed numerous briefs in takings cases in this Court and in the lower courts, both federal and state.[1]

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, amici curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution for the preparation or submission of this brief.

INTRODUCTION

This Court granted certiorari to consider a particular matter (issue preclusion) arising from *Williamson County*'s mandate that a property owner "ripen [its] federal Takings claim" in state court before litigating that claim in federal court. Pet. for Cert. at i. Amici curiae respectfully submit that consideration of this issue is like rearranging the deck chairs on a legal *Titanic*. As explained at length herein, the "state procedures" requirement of *Williamson County* "was not correct when it was decided, and it is not correct today"; therefore, the requirement "ought not to remain as binding precedent." *Lawrence v. Texas*, 539 U.S. 558, 578 (2004). In a word, it should be *overruled*.

Amici acknowledge that the Court rarely overrules a prior decision without full briefing of that point by the parties. But as set forth in Part II of the Argument below, the state procedures requirement was not one of the questions presented in *Williamson County*, and so that requirement was fabricated without any serious briefing or argument. Accordingly, it is not surprising that the state procedures requirement deviated sharply from the established understanding of the Just Compensation Clause and that it has generated massive doctrinal incoherence. No subsequent decision of this Court has defended the state procedures requirement, and virtually no one in the academy will defend it either as a theoretical matter. And for good reason—the requirement is indefensible, a jurisprudential embarrassment that ought to be discarded as soon as possible.

As the Court has repeatedly stated, when "governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent." *Seminole Tribe v. Florida*, 517 U.S. 44, 63 (1996) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). Therefore, now is the time to overrule the unworkable and badly reasoned state procedures requirement of *Williamson County*.

SUMMARY OF ARGUMENT

1. It is important to comprehend the precise federal right at issue in cases within the sweep of the state procedures requirement. The property owner in such cases sues to enforce a right to recover just compensation for a taking. That right, and the corresponding obligation of the government to pay just compensation, was always understood to accrue or arise at the time of the taking, and not later. In asserting that the right and the obligation accrued at some later point after the denial of state-law remedies in a state court, *Williamson County* deviated sharply from the established understanding of the Just Compensation Clause.

2. The state procedures requirement was not one of the questions presented in *Williamson County*, and so it received only the most cursory treatment in the briefing and argument. Not surprisingly, therefore, the requirement is poorly reasoned. It rests principally on two flawed analogies to inapposite decisions that decree the unavailability of (1) equitable relief against compensable takings, and of (2) relief under the Due Process Clause for random and unauthorized deprivations of property, neither of which is remotely at issue. Nor can the requirement be justified by the principle that the Fifth Amendment proscribes only takings *without just compensation*, which supports a no-equitable-relief rule but not exhaustion of state judicial remedies.

3. The state procedures requirement has other defects that show its doctrinal incoherence. Among these are that the requirement is really an exhaustion mandate that conflicts with the no-exhaustion-of-remedies rule governing other federal rights, as twice recognized in bills passed by the House of Representatives. In addition, the requirement is in practice ignored by state courts (and by this Court in cases originating from state courts), even though it logically should apply in those fora. Finally, though touted as promoting local decisionmaking, the requirement affirmatively invites *dis*respect for state courts by treating them as mere stations on the road to federal court.

ARGUMENT

For the following reasons, the Court should overrule the state procedures requirement fabricated in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194-97 (1985).

I. In Creating the State Procedures Requirement, *Williamson County* Deviated Sharply from the Established Understanding of the Just Compensation Clause.

The question presented focuses on the preclusive effect vel non of the "state court proceeding that was required to ripen [petitioners'] federal Takings claim." Pet. for Cert. at i. That petitioners had to "ripen" that claim by proceeding in state court is, of course, a consequence of this Court's decision in *Williamson County*. The "state procedures" requirement of that decision—so called to distinguish it from the "final decision" requirement, which is not at issue here —decreed that a property owner must "seek compensation through the [state-law] procedures the State has provided for doing so" before presenting to a federal court a federal claim for just compensation. 473 U.S. at 194.

A. At Issue Here Is the Right to Recover Just Compensation for Takings of Private Property for Public Use.

In fabricating the state procedures requirement, the *Williamson County* opinion referred to a property owner's claiming or suffering "a violation of the Just Compensation Clause." 472 U.S. at 194-95; *accord id.* at 195 n.13 (referring to a "constitutional violation" stemming from a taking). While it is not unusual to use the term *violation* in a loose sense in connection with a claim for just compensation, this terminology obscures the true "nature of the constitutional right" at issue. *Id.* Property owners who seek just compensation in court under the Fifth Amendment are not claiming "constitutional violations" in the sense that they sue to enjoin or remedy state action that violates or transgresses

constitutional norms.[2] Rather, as the Court articulated in *First English Evangelical Lutheran Church v. County of Los Angeles*, these property owners sue to enforce the government's "constitutional obligation to pay just compensation" along with their corresponding "right to recover just compensation." 482 U.S. 304, 315 (1987) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960), and *Jacobs v. United States*, 290 U.S. 13, 16 (1933)). Thus, the owners are pursuing a monetary remedy that is "grounded in the Constitution itself." *Id.* at 315; *accord id.* at 316 ("the Court has frequently repeated the view that, in the event of a taking, the compensation remedy is required by the Constitution").[3]

B. It Was Always the Law That the Right to Recover Just Compensation Accrues at the Time of the Taking.

When does the government's constitutional obligation to pay just compensation arise? Or, to ask the same thing, when does a property owner's claim for just compensation accrue? The answer is that the taking, the obligation of the taker to pay just compensation, and the owner's claim for compensation come into being simultaneously, as this Court and the lower federal courts consistently held for decades prior to *Williamson County*. This Court has explained:

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[2] In certain circumstances, of course, one may allege a "violation" of the Takings Clause and ask a court's aid in enjoining that violation. A typical example is the allegation that a statute effects an uncompensated taking and that just compensation is not even potentially available. *See, e.g., Eastern Enterprises v. Apfel*, 524 U.S. 498, 538 (1998) (plurality opinion) (concluding that "the Coal Act's allocation of liability to Eastern violates the Takings Clause, and that [the statute] should be enjoined as applied to Eastern").

[3] A three-Justice plurality in *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687, 710 (1999), suggested that the property owner "sought not just compensation *per se* but rather damages for the unconstitutional denial of such compensation." Yet the plurality's analysis did not turn on the distinction between that view and a view of the case "as a simple suit for just compensation." *Id.*

> When a taking occurs by physical invasion, . . . the usual rule is that the time of the invasion constitutes the act of taking, and "[it] is that event which gives rise to the claim for compensation and fixes the date as of which the land is to be valued . . . ."

United States v. Clarke, 445 U.S. 253, 258 (1980) (quoting *United States v. Dow*, 357 U.S. 17, 22 (1958)).

Numerous decisions of this Court state essentially the same rule using slightly different phraseology. In *United States v. Dickinson*, 331 U.S. 745 (1947), the Court rejected the government's argument that Dickinson's reclamation of a portion of property previously taken by flooding rendered him ineligible to be paid for the original taking: "[N]o use to which Dickinson could subsequently put the property by his reclamation efforts changed the fact that the land was taken when it was taken and *an obligation to pay for it then arose*." *Id.* at 751 (emphasis added). In *Soriano v. United States*, 352 U.S. 270, 275 (1957), the Court affirmed as time-barred the dismissal of petitioner's claim against the government "for just compensation for supplies . . . taken from him . . . during the Japanese occupation of the Philippines." As it rejected petitioner's argument that the hostilities tolled the applicable statute of limitations, the Court agreed that petitioner's compensation claim "accrued at the time of the taking." *Id.*; *accord United States v. Rogers*, 255 U.S. 163, 169 (1921) ("Having taken the lands of the [claimants], it was the duty of the government to make just compensation as of the time when the owners were deprived of their property."); *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 306 (1923) (same).[4]

[4] The law in the Court of Appeals for the Federal Circuit and the old Court of Claims is the same. *See Alliance of Descendants of Texas Land Grants v. United States*, 37 F.3d 1478, 1481 (Fed. Cir. 1994) ("A claimant under the Fifth Amendment must show that the United States, by some specific action, took a private property interest for a public use without just compensation. Therefore, a claim under the Fifth Amendment accrues when that taking action occurs."); *Inupiat Community of Arctic Slope v. United States*, 680 F.2d 122, 127 (Ct. Cl.) (holding that because the "alleged act of taking was the Settlement Act, the takings claims "accrued on . . . the date on which the Settlement Act became effective"), *cert. denied*, 459 U.S. 969 (1982); *Steel Improvement & Forge Co. v. United States*, 355 F.2d 627, 631 (Ct. Cl. 1966) ("It is axiomatic that a cause of action for an unconstitutional taking accrues at the time the taking occurs."); *Stafford Ordinance Corp. v. United States*, 108 F. Supp. 378, 381 (Ct. Cl. 1952) (holding that a "claim accrues in requisitioning property at the time of the actual taking of the property.").

The foregoing cases involved physical takings rather than regulatory takings, but that distinction makes no difference in this context. Thus, the Court of Appeals for the Federal Circuit applies the above-described rule to regulatory takings claims. *See Creppel v. United States*, 41 F.3d 627, 633 (Fed. Cir. 1994) (applying rule to a claim that the EPA effected a regulatory taking by blocking a reclamation project). Moreover, nothing in *Williamson County*'s discussion of state procedures hinges on the physical/regulatory distinction: the opinion purports to rest on "the nature of the constitutional right" in general, 473 U.S. at 195 n.13, not the nature of a specifically *regulatory* taking. *See, e.g., Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 958 & n.28 (7th Cir. 2004) (applying the state procedures requirement to physical takings, in accord with other courts of appeals).

In any event, the limited discussion in this Court regarding the accrual of regulatory takings claims confirms the coincidence of taking and duty to pay compensation. In *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 623 (1981), the Court ruled that it lacked jurisdiction to address the question presented—whether "a State must provide a monetary remedy to a landowner whose property allegedly has been 'taken' by a regulatory ordinance." But writing for four Justices—and commanding the substantial agreement of a fifth, *see id.* at 633-34 (Rehnquist, J., concur-

ring)—Justice Brennan would have reached that question and answered it in the affirmative, *see id.* at 653-60 (Brennan, J., dissenting). His analysis was grounded in part on the recognition that "[a]s soon as private property has been taken, . . . 'the self-executing character of the constitutional provision with respect to just compensation' is triggered." *Id.* at 654 (quoting *Clarke*, 445 U.S. at 257). When Justice Brennan's dissent later became law in *First English*, and the Court expressly reaffirmed "the self-executing character of the constitutional provision with respect to just compensation," 482 U.S. at 315, the Court necessarily reaffirmed as well that this constitutional provision is triggered "[a]s soon as private property has been taken."

In short, it was the consistent rule of this Court and the lower federal courts for many decades that the constitutional obligation to pay just compensation arises, and the claim for just compensation accrues, at the time of the taking. Whether stated that the event of taking "gives rise to the claim for compensation," *Dow*, 357 U.S. at 22; *Clarke*, 445 U.S. at 258, or that the obligation to pay just compensation is triggered "[a]s soon as private property has been taken," *San Diego Gas*, 450 U.S. at 654 (Brennan, J., dissenting), the rule was well-established. In asserting that a property owner's monetary claim under the Just Compensation Clause does not accrue "until just compensation has been denied" by the state judicial system, 473 U.S. at 195 n.13, *Williamson County* deviated sharply from the traditional understanding of that Clause.

II. In Creating the State Procedures Requirement, *Williamson County* Built a House on Jurisprudential Sand.

Did such a sharp deviation from decades of consistent constitutional interpretation come after sustained reflection in the face of compelling new authority? Was the state procedures requirement forged in the fires of intensive and extensive doctrinal reassessment in light of developments in

the law of just compensation? In a word, ***no***. In fact, quite the opposite: as explained below, the requirement was fabricated without benefit of serious briefing or argument, and it rests principally on flawed analogies to inapposite cases, as well as other misreadings of precedent.

A. The Requirement Was Fabricated Without Benefit of Serious Briefing or Argument.

In the Court's own words, it granted certiorari in the *Williamson County* case to decide "whether Federal, State, and Local governments must pay money damages to a landowner whose property allegedly has been 'taken' temporarily by the application of government regulations." 473 U.S. at 185. The attorneys general of 19 states and territories, together with the Solicitor General of the United States, the National Association of Counties, the City of New York, and the City of St. Petersburg, Florida, joined the petitioner in urging the Court to reverse the court of appeals' judgment in favor of the property owner on two alternative grounds: "that a *temporary* regulatory interference with an investor's profit expectation does not constitute a 'taking,'" and "that even if such interference does constitute a taking, the Just Compensation Clause does not require *money damages* as recompense." *Id.* at 175 (emphases added). Four professional and public-interest organizations filed amicus curiae briefs urging affirmance of the judgment. *See id.* at 174.

In the end, all of this briefing was for naught, because the Court did not decide the questions presented. Instead, *Williamson County* left the temporary takings issue "for another day," as it concluded that the property owner's claim for just compensation was "premature." *Id.* at 186; *cf. First English*, 482 U.S. at 310 (deciding the issue after observing that *Williamson County*, among other cases, had left it undecided). The conclusion that the just compensation claim was premature rested primarily on the Court's applying the rule that a regulatory takings claim "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application

of the regulations to the property at issue." *Id.*; *see also id.* at 186-94 (explicating this "final decision" requirement).

Logically, the opinion could have stopped at that point, but it did not. Instead, the opinion put forth a "second reason [why] the taking[s] claim is not yet ripe," namely, that the property owner "did not seek compensation through the procedures the State has provided for doing so." *Id.* at 194. Of the twelve merits briefs filed in *Williamson County*, only the Solicitor General's amicus brief—and only in a single paragraph in its *Summary* of Argument—argued for anything approaching this "second reason." *See* Brief for the United States as Amicus Curiae Supporting Petitioners at 10; *see also* Brief for Respondent at 39 (responding to point in two short paragraphs). Furthermore, although the "state procedures" issue did arise very briefly at oral argument in *Williamson County*, the Solicitor General's representative refused even to give an unequivocal answer to the question whether "a property owner would have to follow judicial review remedies as well for [regulatory action] to ripen into a taking." 1985 U.S. TRANS LEXIS 76, at *25-26 (Feb. 19, 1985); *see also id.* at *26 ("I think it tends to blend in with the question of whether there should be abstention on the state law question of whether the commission had properly applied state law.").

B. The Requirement Rests Principally on Two Flawed Analogies to Inapposite Decisions.

There are very good reasons why the Court "ordinarily do[es] not consider questions outside those presented in the petition for certiorari," and why the Court disregards that rule "only in the most exceptional cases." *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). The "state procedures" aspect of *Williamson County* is a perfect illustration of such reasons. Given that the questions presented did not even touch on state judicial remedies and that the matter did not receive serious briefing or argument, it is no surprise that the fabrication of the state procedures requirement rested principally on two flawed analogies to inapposite decisions.

1. *Ruckelshaus v. Monsanto Co.*

First, the opinion cited *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016-20 (1984), for the notion that "takings claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act." 473 U.S. at 195. From this notion, the opinion purported to draw an analogy: "Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." Granting that the analogy is not wholly implausible, the premise is wholly bogus. If "takings claims" are meant in this passage to refer to monetary claims for just compensation for completed takings of private property—the very claim that the property owner asserted in *Williamson County*—then the cited passage in *Monsanto* did not even consider such claims, let alone declare them "premature" until after the property owner had sued the United States under the Tucker Act.[5]

In *Monsanto*, a company sued in federal district court "seeking *injunctive and declaratory relief* from the operation of" various provisions of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), alleging that "all of the challenged provisions effected a 'taking' of property without just compensation, in violation of the Fifth Amendment." 467 U.S. at 998-99 (emphasis added). Having concluded that some of the challenged provisions might conceivably operate to take the company's property in some circumstances, the Court proceeded to consider (in the passage later cited by

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[5] The Tucker Act grants subject matter jurisdiction to the Court of Federal Claims to hear "any claim against the United States founded upon . . . the Constitution." 28 U.S.C. § 1491(a)(1). This grant authorizes the Court of Federal Claims to adjudicate monetary claims against the United States for just compensation. *See, e.g., United States v. Causby*, 328 U.S. 256, 267 (1946) ("If there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to determine.").

Williamson County) whether that conclusion supported the requested injunctive relief. *Monsanto* ruled that it did not, based on the established rule that "[e]*quitable relief* is not available to enjoin an alleged taking of private property for public use . . . when a suit for compensation can be brought against the sovereign subsequent to the taking." *Id.* at 1016 (emphasis added); *see also id.* at 1017-19 (concluding that such a suit could be brought under the Tucker Act). Thus, the company's request for equitable relief under the Fifth Amendment was not merely *premature*, it was *not available* at all. In other words, there was nothing the company could do to "ripen" its claim for equitable relief; that claim simply had no merit, period.

What about a Tucker Act suit against the government in the Court of Federal Claims? Could such a suit be called a *prerequisite* to asserting a *monetary* claim against the government for just compensation for a taking of property? No, as the *Monsanto* decision confirms, a Tucker Act suit ***is*** the assertion of a claim for just compensation: "whatever taking may occur is one for public use, and a Tucker Act remedy is available to provide Monsanto with just compensation." *Id.* at 1020; *accord supra* note 5. So if *Williamson County* were correct that a property owner must "avail[] itself of the process provided by the Tucker Act" *before* pursuing its claim for just compensation, 473 U.S. at 195, then it would be the rule that a property owner must essentially bring a Tucker Act suit before bringing a Tucker Act suit. In other words, an owner's Tucker Act suit for just compensation would be "premature" until the property owner had brought a Tucker Act suit for just compensation. *Id.* Obviously, this *reductio ad absurdum* deserves no respect, and *Monsanto* provides no reasoned basis for the state procedures requirement.[6]

[6] Although the no-equitable-relief rule could be applied to claims against state and local governments, it has no relevance for the state procedures aspect of *Williamson County*, which makes property owners "seek *compensation* through the procedures the State has provided for doing so." 473 U.S. at 194 (emphasis added).

2. *Parratt v. Taylor*

The fabrication of the state procedures requirement in *Williamson County* also rested on the supposed analogy between takings of private property "without just compensation" and deprivations of property "without due process of law." The Court relied on *Parratt v. Taylor*, 451 U.S. 527 (1981), which it described as having "ruled that a person deprived of property through a random and unauthorized act by a state employee does not state a claim under the Due Process Clause merely by alleging the deprivation of property." 473 U.S. at 195. In such circumstances, "the State's action is not 'complete' in the sense of causing a constitutional injury 'unless or until the State fails to provide an adequate postdeprivation remedy for the property loss.'" *Id.* (quoting *Hudson v. Palmer*, 468 U.S. 517, 532 n.12 (1984)). Then, another purported analogy: "Likewise, because the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State's action here is not 'complete' until the State fails to provide adequate compensation for the taking." *Id.*

This analogy has two fatal flaws.[7] First, it provides no support for the go-first-to-state-court requirement actually imposed by the second prong of *Williamson County*. When a state does indeed "provide an adequate postdeprivation remedy for the property loss" as contemplated by *Parratt*, the deprived property owner does not pursue that state-law remedy *before* suing in federal court under the Due Process

[7] One should really say two fatal flaws in addition to the one that the Court itself acknowledged: "The analogy to *Parratt* is imperfect because *Parratt* does not extend to situations . . . in which the deprivation of property is effected pursuant to an established state policy or procedure." 473 U.S. at 195 n.14. By definition, a taking is *always* effected pursuant to an established state policy or procedure, for if the relevant injury to property results from a truly "random and unauthorized act by a state employee," the property owner has suffered a tort, not a taking.

Clause: To the contrary, the property owner must pursue the state-law remedy *instead of* suing in federal court. As *Williamson County* put it, the owner who has such a remedy categorically "does not state a claim under the Due Process Clause." 473 U.S. at 195. If the analogy with the Just Compensation Clause were valid, the property owner having a state-law remedy for just compensation categorically could not state a claim under the Just Compensation Clause *in any court*. Obviously, no one believes that, then or now.

Second, and more important, the specific notion that "the State's action [in respect to a taking] is not 'complete' until the State fails to provide adequate compensation for the taking," *id.*, is flatly contrary to the Court's sustained and reasoned consideration of the matter in *First English*. There, the Court held that the government's taking of property, without more, gives rise to an "obligation to pay just compensation" on the part of the government, and a corresponding "right to recover just compensation" on the part of the owner. 482 U.S. at 315. While a postdeprivation remedy might allow the government to escape liability for a denial of procedural due process (as in *Parratt*), once a taking has occurred, governmental liability for just compensation is inescapable: "*no subsequent action* by the government can relieve it of the duty to provide compensation." *Id.* at 321 (emphasis added). This formulation has continued to command the Court's assent. *See Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 328 (2002) (quoting passage and opining that "nothing that we say today qualifies [that] holding" of *First English*).

C. The Requirement Finds No Support in the Principle That the Amendment Proscribes Only Takings *Without Just Compensation*.

Along with flawed analogies to *Monsanto* and *Parratt*, *Williamson County* relied on the uncontroversial principle that the "Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." 473 U.S. at 194. Indeed, this principle was so significant

that the opinion both reiterated and emphasized the point: "because the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied." *Id.* at 195 n.13.

Both of these propositions are quite true; both are also quite irrelevant to whether property owners must seek just compensation in state court under state law. As explained in Part I.A above (pp. 4-5), property owners who seek just compensation under the Fifth Amendment are neither seeking to "proscribe" (i.e., enjoin) takings nor asserting "constitutional violations." Instead, they are asserting a federal "right to recover just compensation," the monetary remedy that is "grounded in the Constitution itself."[8]

To put the point another way, the principle that the Fifth Amendment proscribes (only) those takings that are without just compensation leads not to the state procedures requirement but rather to the rule (reiterated in *Monsanto*) that "[e]quitable relief is not available to enjoin an alleged taking of private property for public use . . . when a suit for compensation can be brought against the sovereign subsequent to the taking." 467 U.S. at 1016, *discussed at supra* note 6 and accompanying text. That is, the "proscribes takings without just compensation" point cited by *Williamson County* is a fine basis for rebuffing property owners who ask federal courts to *enjoin state regulatory programs*; however, it is no basis at all for rebuffing property owners who ask federal courts to *award just compensation*.

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[8] *First English*, 482 U.S. at 315. There is no tension between *First English* and principle that the Fifth Amendment proscribes takings *without just compensation*. To the contrary, in the sentence immediately preceding the opinion's reiteration that takings trigger the "constitutional obligation to pay just compensation," *First English* emphasized that the Fifth Amendment "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." 482 U.S. at 315.

III. The State Procedures Requirement Has Other Defects that Show Its Doctrinal Incoherence.

If *Williamson County*'s state procedures requirement was not correct when it was decided, then it is also defective in additional ways that have come to light in the past two decades. Other amici have described many of these defects: the requirement is fundamentally unfair (the present case, for example, has consumed *twelve years* without a resolution on the merits, and amici began their own state-court actions nearly *ten years* ago); it is irreconcilable with *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997); and it spawns litigation about litigation instead of promoting resolution of federal constitutional claims on the merits. Two longtime and respected advocates in this Court have exhaustively catalogued the depths to which *Williamson County* has brought takings procedure. *See* Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There from Here*, 36 URB. LAW. 672 (2004). In the following sections, amici discuss three other defects.

A. The Requirement Is Inconsistent with the No-Exhaustion-of-Remedies Rule Governing Other Federal Rights.

The intended effect of *Williamson County*'s state procedures requirement is to remit property owners with what had long been described as "accrued" *federal* claims for just compensation, *Soriano*, 352 U.S. at 275, to *state* courts to pursue remedies under *state* law. This result is anomalous on its face, and it is especially jarring in light of the Court's long-standing and firm refusal, with respect to *other* federal claims asserted pursuant to 42 U.S.C. § 1983, to "require[] exhaustion of state *judicial* . . . remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974) (emphasis added), *quoted in Patsy v. Board of Regents*, 457 U.S. 496, 500 (1982). In practice, therefore, the state procedures requirement has effectively caused the Just Compensation Clause, "as much a part of

the Bill of Rights as the First Amendment or [the] Fourth Amendment, [to] be relegated to the status of a poor relation," notwithstanding the Court's protestations to the contrary in *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

The House of Representatives views the state procedures requirement as an "exhaustion" mechanism applying only to claims for just compensation, and has twice passed bills to eliminate it.[9] The House Judiciary Committee's report on the latter bill made clear that the non-exhaustion provision had as its target *Williamson County*'s state procedures requirement because the House viewed the requirement as a kind of exhaustion-of-judicial-remedies rule that was *rejected* in *Steffel*, *Patsy*, and many other decisions of this Court. *See* H.R. Rep. No. 106-518, at 13 & n.3 (2000). The committee report explained that the "combined effect of *Williamson County*, and the application of issue and claim preclusion [as presented in this case], is to drive out of Federal court virtually all Federal claims for just compensation for takings of private property by local governments." *Id.* at 13. As a result of the state procedures requirement, then, "property rights are procedurally disadvantaged compared to other civil rights." *Id.* (section heading).[10]

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[9] *See* Private Property Rights Implementation Act of 1997, H.R. 1534, 105th Cong., § 2 (adding 28 U.S.C. § 1343(e)(3) to provide that property owners seeking to enforce the Just Compensation Clause pursuant to 42 U.S.C. § 1983 need not "exhaust judicial remedies provided by any State or territory"); Private Property Rights Implementation Act of 2000, H.R. 2372, 106th Cong., § 2 (adding 28 U.S.C. § 1343(e)(4) to provide that claims for just compensation asserted pursuant to § 1983 are "ripe for adjudication even if the party seeking redress does not exhaust judicial remedies provided by any State or territory").

[10] If the present brief echoes the language of the cited committee report, that is because the report echoes the language of the Brief Amicus Curiae of Pacific Legal Foundation authored and filed by present amici's counsel in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999).

B. The Requirement Is in Practice Ignored by State Courts and by this Court.

If the state procedures requirement truly derives from the "nature" of the federal right to just compensation—as opposed to being merely a "procedural scheme under which claims may be heard in federal courts," *Patsy*, 457 U.S. at 501—then the requirement necessarily governs regardless of the judicial forum in which the federal right is asserted. That is, under the logic of *Williamson County*, "a property owner cannot claim a violation of the Just Compensation Clause" *even in state court* until it has used the "procedure for seeking just compensation" provided by the state. 473 U.S. at 195. In other words, no *federal* claim for just compensation may be presented to a *state* court unless and until the property owner has fully (and unsuccessfully) litigated his state-law claim for compensation (in the state judicial system).

This precept follows unassailably from the state procedures requirement; this precept is also uniformly ignored both by state courts themselves and by this Court. As for state courts, amici are aware of none that refuses to adjudicate *federal* claims for just compensation on the ground that they are premature until a property owner has pursued to completion all claims for compensation under *state* law. To the contrary, it is not difficult to cite numerous examples of state judicial systems that will hear and determine federal claims for just compensation *before* state-law compensation claims have been fully litigated.[11]

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[11] *See, e.g., Jacobs Wind Electric Co. v. Department of Transportation*, 626 So. 2d 1333, 1337 (Fla. 1993) (contemplating that a patent holder would assert its claims under the Just Compensation Clause *along with* its claims under the state analogue thereto and under state common law); *Kavanau v. Santa Monica Rent Control Board*, 941 P.2d 851, 855 (Cal. 1997) (observing that the property owner brought a claim for "'just compensation' in the form of lost rental income and interest" under both "article I, section 19 of the California Constitution and the Fifth Amendment of the United States Constitution"), *cert. denied*, 522 U.S. 1077 (1998); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 930 (Tex. 1997) (finding ripe the plaintiff's "just compensation takings claims" brought at the same time "under the United States Constitution and Texas Constitution"); *Palazzolo v. State*, 746 A.2d 707, 711 (R.I. 2000) (observing that plaintiff "brought an inverse condemnation action" that asserted "a taking of his property for which he was entitled to compensation pursuant to the United States and Rhode Island Constitutions"), *aff'd in part, rev'd in part*, 533 U.S. 606 (2001).

As for this Court, consider the last two pure regulatory takings cases it has entertained on certiorari to state courts. In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1009 (1992), the Court observed that following enactment of the relevant state statute, "Lucas promptly filed suit in the South Carolina Court of Common Pleas, contending that the Beachfront Management Act's construction bar effected a taking of his property without just compensation." Even though the Court postponed its discussion of the merits to address whether Lucas had satisfied *Williamson County*'s "final decision" requirement, *see id.* at 1010-14, the Court was not concerned in the least whether Lucas had also satisfied *Williamson County*'s "state procedures" requirement by litigating to completion whatever state-law claims for compensation he might have prior to asserting his federal claim for just compensation.

Likewise, in *Palazzolo v. Rhode Island*, 533 U.S. 606, 611 (2001), the Court observed that following proceedings before the state Coastal Resources Management Council, Palazzolo "sued in state court, asserting the Council's application of its wetlands regulations took the property without compensation in violation of the Takings Clause of the Fifth Amendment." Again, while the Court addressed the final decision requirement at length, *see id.* at 618-26, it gave no attention to the state procedures requirement. In contrast to *Williamson County*, the Court certainly did not go out of its way to assure itself that, *before* Palazzolo first asserted his federal claim for just compensation, he did indeed "seek

compensation through the procedures the State has provided for doing so."[12]

Amici point out these anomalies not to urge the state courts to be more eager in rebuffing federal takings claims on procedural grounds (or this Court to be more vigilant in exercising its certiorari jurisdiction) but rather to highlight the profound impact to state courts that would result from applying the state procedures requirement to the limits of its ineluctable logic. As explained in the following section, that impact also includes the fostering of an institutional disrespect for state courts.

C. The Requirement Invites Disrespect for State Courts by Treating Them as Mere Stations on the Road to Federal Court.

In a letter expressing its (unsuccessful) opposition to passage by the House of a bill eliminating the state procedures requirement, *see supra* note 9 and accompanying text, the Department of Justice cited "'a proper respect for State functions'" in arguing that "State courts are as capable as Federal courts in adjudicating local land use cases." H.R. Rep. No. 106-518, at 37, 42 (quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971)). These arguments naturally evoke the decisions of this Court that call for a "proper respect for the ability of state courts to resolve federal questions presented in state-court litigation." *Pennzoil Co. v. Texaco, Inc.*, 481

[12] In fact, neither Lucas nor Palazzolo litigated state-law claims to completion prior to asserting their federal claims. It is doubtful whether Lucas even asserted a state-law claim at all, the majority opinion of the South Carolina Supreme Court being devoid of any references to such a claim. *See Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S.C. 1991); *but cf. id.* at 907 (Hartwell, J., dissenting) ("Having determined that application of the Act constitutes a taking under the Constitution of the United States, it is not necessary to examine whether it constitutes a taking under the South Carolina Constitution."). Palazzolo did assert a state-law claim—*at the same very time as* he asserted his federal claim. *See Palazzolo v. State*, 746 A.2d 707, 711 (R.I. 2000).

U.S. 1, 14 (1987). Amici concur with the Department that this respect should influence the Court's thinking about the state procedures requirement. As set forth below, however, the requirement actually invites *dis*respect for state courts and their ability to resolve federal questions.

It has long been recognized that, notwithstanding "the paramount role Congress has assigned to the federal courts to protect constitutional rights," *Steffel*, 415 U.S. at 473, as a general matter "the state and federal courts have concurrent jurisdiction of suits of a civil nature arising under the Constitution and laws of the United States." *Grubb v. Public Utilities Commission*, 281 U.S. 470, 476 (1930); *accord, e.g., Tafflin v. Levitt*, 493 U.S. 455, 459 (1990). Monetary claims arising under the Just Compensation Clause are encompassed by this general rule, and state courts routinely adjudicate such federal claims against state and local governments. *See, e.g., Lucas*, 505 U.S. at 1010-32 (reviewing South Carolina courts' disposition of such claim); *Palazzolo*, 533 U.S. at 617-32 (reviewing Rhode Island courts' disposition of such claim).

Consider a procedural regime in which both the state courts and the lower federal courts adjudicate the federal claims for just compensation respectively presented to each. Property owners who agree with the Justice Department's prediction that "State courts are likely to be as sympathetic to local property owners as Federal courts," H.R. Rep. No. 106-518, at 37, will naturally gravitate toward the former; those who disagree, the latter. Each court system will develop federal takings law subject to this Court's review and, significantly, without interference from the other. Such a regime would not only yield more efficient decisionmaking, it would also truly show that "proper respect for ability of state courts to resolve federal questions presented in state-court litigation" enunciated in *Pennzoil Co.*, 481 U.S. at 14.

By contrast, consider the regime created by the state procedures requirement of *Williamson County*. Under that regime, federal courts consider state courts not as parallel

departments of a dual sovereign but rather as "hurdles" to be overcome on the road to resolution of claims by federal courts. *E.g., Richardson v. City & County of Honolulu*, 124 F.3d 1150, 1165 (9th Cir. 1997), *cert. denied*, 525 U.S. 871, 921, 1018 (1998); *Eide v. Sarasota County*, 908 F.2d 716, 720-21 (11th Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991). Moreover, federal courts send property owners packing off to state courts to litigate state-law claims they do not wish to pursue and to obtain rulings that may have absolutely no consequence in subsequent federal proceedings.[13] Forcing pointless detours to state courts to litigate sideshow issues demonstrates affirmative *dis*respect for those courts rather than the requisite proper respect.

CONCLUSION

As the Court recently reiterated, the doctrine of *stare decisis* is "not . . . an inexorable command." *Lawrence*, 539 U.S. at 577 (quoting *Payne*, 501 U.S. at 828). It is, instead, "a principle of policy" that must yield when the rationale of a prior decision "does not withstand careful analysis." *Id.* As this brief has shown, the state procedures requirement of *Williamson County* does not withstand such analysis: it was fashioned in circumstances that warrant no confidence its soundness, and "precedents before and after its issuance contradict its central holding." *Id.* Though state and local governments "rely" on it as a ready means to exhaust those

[13] *DLX, Inc. v. Kentucky*, 381 F.3d 511, 515-16 (6th Cir. 2004), is a very recently reported example. The property owner spent four years fulfilling the state procedures requirement in the Kentucky Circuit Court, the Kentucky Court of Appeals, and the Kentucky Supreme Court. *See Commonwealth v. DLX, Inc.*, 42 S.W.3d 624 (Ky. 2001). At the end of this marathon, the state courts denied compensation under state law based on "the operation of a state procedural rule without analogue in federal law," 381 F.3d at 520 —a ruling that advanced resolution of the owner's federal claim for just compensation not a single bit, *see id.* at 516-26.

property owners having temerity enough to assert federal claims for just compensation, "there has been no individual or societal reliance on [the state procedures requirement] of the sort that could counsel against overturning its holding once there are compelling reasons to do so." *Id.*

This last point is crucial, for we may expect a chorus from respondents and their amici about how the state procedures requirement is a pillar of Western Civilization and how overruling it will usher in a new Dark Ages. We think this chorus is largely driven by the desire of governments and their allies to narrow the substantive scope of regulatory takings law. Although that desire is understandable and, in the proper case, a legitimate litigating position, we trust that Members of this Court will resist the temptation to treat the state procedures requirement as a stand-in for disputing the substantive reach of the Just Compensation Clause. Whether that Clause affords broad relief to regulated property owners, narrow relief, or even no relief at all ought not to matter here: consistent with "the paramount role Congress has assigned to the federal courts to protect constitutional rights," *Steffel*, 415 U.S. at 473, the answers to that question should be resolved in federal court without requiring exhaustion of state-law remedies in state court.

For these reasons, the state procedures requirement of *Williamson County* should be overruled, and the judgment of the court of appeals should be reversed.

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